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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 238

MARTIN ERRECA; AND BERNARD F. GAVIN AND GEORGE D. COLEMAN, ADMINISTRATORS OF THE ESTATE OF THOMAS J. GAVIN, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 92-111) is reported in 76 F. Supp. 87.

JURISDICTION

The judgment of the Court of Claims was entered April 5, 1948 (R. 111). Plaintiff's motion for a new trial was overruled on June 1, 1948 (R. 111). The petition for a writ of certiorari was filed on

August 23, 1948. The jurisdiction of this Court rests upon section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939 (28 U.S.C. sec. 288(b), now 28 U.S.C. sec. 1255).

QUESTION PRESENTED

Whether the Court of Claims erred in holding that the so-called reservations in the deeds and contracts through which plaintiffs claim title to their lands prevented recovery for loss of use of waters resulting from construction of a Government dam.

STATEMENT

This suit was brought to recover for the alleged taking of property as a result of erection of the Friant Dam on the San Joaquin River, California. Seven similar cases were instituted by other parties and all eight cases were consolidated by order of the court and were tried together. After submission to the Court of Claims, one case was remanded to the commissioner. Judgments were entered against the United States in six cases and a petition for writs of certiorari to review those judgments has been filed by the United States. *United States* v. *Gerlach Live Stock Company,* and companion cases, Nos. 299-304, October Term, 1948.

The claim asserted in the instant case was dismissed by the Court of Claims (R. 92). The facts material thereto may be summarized as follows:

Prior to 1935, the lands in question were owned by Miller & Lux, Incorporated, which owned large

areas of land in the vicinity and had diverted and appropriated water in the river upstream from petitioners' lands to irrigate lands owned by them and other persons (Fdgs. 9-10, R. 32-33). In 1935 and 1936, three contracts were executed whereby Miller and Lux agreed to sell to Martin Erreca the lands here concerned and in 1942, Miller & Lux executed a deed conveying such lands (Fdgs. 64, 67, R. 75-81, 82). The other petitioners own interests in the lands through Martin Erreca (Fdgs. 65-70, R. 81-82). Two of the agreements of sale covering parcels numbered 1, 2, and 7 provided (Fdg. 71, R. 82-83):

> The land above described is riparian to Mariposa Slough, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller's) of any water which may at any time be actually flowing in said Slough as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein or being therein after being stored or used by third persons at any point or points above the land herein agreed to be conveyed and use the same for the irrigation of riparian or non-riparian lands, and/or for production of hydro-electric power. The rights herein reserved may be transferred to and exercised by any

public district, private or mutual water company, firm, or individual, to which seller may transfer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The third agreement relating to parcels 3-6 provided (Fdg. 71, R. 83-84):

> The land above described is riparian to Mariposa Slough and other sloughs, and purchaser shall have a right to make a reasonable use as a riparian owner and in common with lower riparian land (including that of seller) of any water which may at any time be actually flowing in said Sloughs as the same passes said above-described land. It is expressly understood and agreed, however, that the seller reserves the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries, whether naturally flowing therein or being therein after being stored or used by third persons at any point or points above the land herein agreed to be conveyed, and use the same for the irrigation of riparian or nonriparian lands, whether within or without the watershed of said River, and/or for the production of hydroelectric power. The rights herein reserved may be transferred to and exercised by the United States of America, the State of California, or any of their agencies, any public district, private or mutual water company, firm, or individual, to which seller may trans-

> fer or assign said rights. These reserved rights shall constitute an easement in said lands so agreed to be conveyed and the riparian rights thereto.

The provisions set forth above were included in the 1942 deed (Fdg. 71, R. 84). Miller & Lux has transferred its rights to the United States (Fdgs. 37-38, R. 54-57).

The land is not overflowed "except in a year of extreme high flow" but when the water is high in the main channel and the sloughs, it seeps therefrom a distance of approximately half a mile (Fdg. 75, R. 85-86). The court found that the land derives benefit from the spring floods of the San Joaquin River and that the planned operation of the Friant Dam and the canals will prevent the further subirrigation of the Erreca lands during the spring floods (Fdgs. 75, 76, R. 86).

In dismissing the claim asserted in the instant case, the Court of Claims, in its opinion, reasoned that the reservations in the agreements and deed, *supra,* went further than a retention by Miller & Lux, Incorporated, of merely its existing rights in the land, and that, as against the grantee, they reserved the right to appropriate "all or any part" of the waters of the river (R. 99-100).

ARGUMENT

1. Petitioners contend that the provisions of the agreements and deed should be construed as relating only to the then existing rights of Miller &

Lux. Obviously, whether the court below correctly interpreted these instruments does not present a question of general importance. Petitioners claim that the court below has decided an important question of local law in a way in conflict with applicable local decisions (Pet. p. 3). These decisions constitute simply general principles of construction of instruments (Pet. p. 13). As petitioners recognize by their citations of decisions from many states (see e.g. Pet. p. 7-8, 9, 12, 16-17) no special rule of California as distinguished from generally recognized rules of construction are relied upon. It does not appear that the court below ignored these principles and since petitioners do not refer to any decision construing an instrument similar to those here involved there is no conflict of decisions.

Petitioners also urge that there is a conflict between the findings of the court below and its opinion which calls for an exercise of this Court's supervisory power (Pet. p. 3). But there is no such conflict, since the opinion recognized that the purpose of Miller & Lux when selling some of their lands was to retain their rights, and then concluded that under the express provisions of these instruments they went further (R. 99-100; cf. Fdg. 72, R. 84). The court was there applying the usual rule that "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; * * *." Cal. Civil

Code, sec. 1639; *Los Angeles & Salt Lake Railroad Co.* v. *United States,* 140 F. 2d 436 (C.C.A. 9).

2. Moreover, the construction of these instruments by the court below was clearly correct. The instruments provided that the petitioners should have the right to make a reasonable use "of any water which may at any time be actually flowing in said Sloughs as the same passes said above-described land" but reserved to Miller & Lux "the right to store, impound, divert, and use all or any part of the waters of the San Joaquin River and its tributaries" (R. 83). Petitioners' argument is that, as construed by the court below, these two provisions are inconsistent and it is said that thereby the land is left "with *no* vested water rights" (Pet. p. 12). But the land was not stripped of its riparian rights completely, for that would have prevented the owners from using the waters that were not diverted above them but were permitted to flow to them.[1] The agreements clearly expressed the intention that the purchasers should have rights in any water that should reach their lands but would have no right to complain of any diversion before the water reached the lands. Petitioners' construction that the instruments reserved all of the water some of the time and only a portion

[1] Petitioners, in effect, recognize this, since they agree that at some periods of the year and in some years of small floods they were not entitled to receive any water. Certainly they would not contend that during those periods they had no riparian rights.

of the water at others (Pet. p. 12), attempts simply to re-write the express language "all or any part of the waters" (R. 83).

The reservation of the right to "store, impound, [or] divert" the waters went beyond existing rights of the grantor because at the time Miller & Lux "owned no right to store any water of the river at Friant, nor did it own any right to store any water of the river elsewhere" (Fdg. 72, R. 84). The instruments themselves therefore contradict petitioners' theory that only existing rights were reserved.

Petitioner's theory defeats itself. It rests upon the assumption that when Miller & Lux executed the deeds containing the reservation that company had no right to store and divert water at Friant (Pet. 8, 10-12, 14, 30-32). It is argued then that since a reservation deals with present rather than future interests, the reservation could not have withheld a right to store and divert at Friant (Pet. pp. 6-13). But if the basic assumption is accepted that Miller & Lux had no such right to reserve, it follows that Miller & Lux had no such right to convey to petitioners. Since petitioners claim only through the grant from Miller & Lux (cf. Pet. p. 10), it follows that the United States could not have taken from them a right which was either reserved by their grantor or not conveyed to petitioners because their grantor did not have such a right to convey to them.

CONCLUSION

The decision of the court below is correct, and presents no conflict or question which should be decided by this Court.

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